

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY AND  
UNITED STATES DEPARTMENT OF JUSTICE REVISED  
MODEL CERCLA SECTION 122(g)(4) *DE MINIMIS* LANDOWNER  
ADMINISTRATIVE ORDER ON CONSENT**

**May 13, 2004**

This model and any internal procedures adopted for its implementation and use are intended as guidance for employees of the U.S. Environmental Protection Agency and the U.S. Department of Justice. They are not rules and do not create legal obligations. The extent to which EPA or DOJ applies them to a particular case will depend upon the facts of the case.

**REVISED MODEL CERCLA SECTION 122(g)(4) *DE MINIMIS* LANDOWNER  
ADMINISTRATIVE ORDER ON CONSENT**

[For Settlement with Landowners under CERCLA § 122(g)(1)(B)]

	)	
IN THE MATTER OF:	)	U. S. EPA Docket
	)	No. _____
[Insert Site Name and Location]	)	
	)	
Proceeding under Section 122(g)(4)	)	
of the Comprehensive Environmental	)	ADMINISTRATIVE ORDER
Response, Compensation, and Lia-	)	ON CONSENT
bility Act of 1980, as amended,	)	
42 U.S.C. § 9622(g)(4)	)	
	)	

**I. JURISDICTION**

1. This Administrative Order on Consent ("Consent Order" or "Order") is issued pursuant to the authority vested in the President of the United States by Section 122(g)(4) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, ("CERCLA"), 42 U.S.C. § 9622(g)(4), to reach settlements in actions under Section 106 or 107 of CERCLA, 42 U.S.C. §§ 9606 or 9607. The authority vested in the President has been delegated to the Administrator of the United States Environmental Protection Agency ("EPA") by Executive Order 12580, 52 Fed. Reg. 2923 (Jan. 29, 1987), and further delegated to the Regional Administrators of the EPA by EPA Delegation No. 14-14-E [insert reference to Regional redelegation, if any].

2. This Administrative Order on Consent is issued to [insert name] ("Respondent"). Respondent agrees to undertake all actions required by this Consent Order. Respondent further consents to and will not contest EPA's jurisdiction to issue this Consent Order or to implement or enforce its terms.

3. EPA and Respondent agree that the actions undertaken by Respondent in accordance with this Consent Order do not constitute an admission of any liability by Respondent. Respondent does not admit, and retains the right to controvert in any subsequent proceedings other than proceedings to implement or enforce this Consent Order, the validity of the Statement of Facts or Determinations contained in Sections V and VI, respectively, of this Consent Order.

**II. PARTIES BOUND**

4. This Consent Order shall apply to and be binding upon EPA and upon Respondent and Respondent's [heirs,] successors and assigns. Any change in ownership or corporate or other

legal status of Respondent, including but not limited to, any transfer of assets or real or personal property, shall in no way alter Respondent's responsibilities under this Consent Order. Each signatory to this Consent Order certifies that he or she is authorized to enter into the terms and conditions of this Consent Order and to execute and bind legally the party represented by him or her.

### **III. STATEMENT OF PURPOSE**

**[NOTE: As drafted, this Statement of Purpose assumes that Respondent is providing valuable consideration which may include any combination of access, cooperation, institutional controls, cash, work, etc., in exchange for a full and final settlement with EPA for all civil liability under CERCLA Sections 106 and 107 with respect to the Site as a whole. When using this or any other Statement of Purpose, be sure that it is consistent with the Covenant Not to Sue, the Reservations of Rights, and the definition of "matters addressed" in the Contribution Protection provision.]**

5. By entering into this Consent Order, the mutual objectives of the Parties are:

a. to reach a final settlement among the Parties with respect to the Site pursuant to Section 122(g) of CERCLA, 42 U.S.C. § 6922(g), that allows Respondent to provide valuable consideration to EPA to resolve Respondent's alleged civil liability under Sections 106 and 107 of CERCLA, 42 U.S.C. §§ 9606 and 9607, for injunctive relief with regard to the Site and for response costs incurred and to be incurred at or in connection with the Site, thereby reducing litigation related to the Site;

b. to simplify any remaining administrative and judicial enforcement activities concerning the Site by eliminating a potentially responsible party from further involvement at the Site; [and]

c. **[Use this Subparagraph (c) where consideration includes a cash payment]** to obtain settlement with Respondent for Respondent's fair share of response costs incurred and to be incurred at or in connection with the Site by the EPA Hazardous Substance Superfund, and by other persons; and

d. to provide for full and complete contribution protection for Respondent with regard to the Site pursuant to Sections 113(f)(2) and 122(g)(5) of CERCLA, 42 U.S.C. §§ 9613(f)(2) and 9622(g)(5).

### **IV. DEFINITIONS**

6. Unless otherwise expressly provided herein, terms used in this Consent Order that are defined in CERCLA or in regulations promulgated under CERCLA shall have the meaning assigned to them in the statute or regulations. Whenever the terms listed below are used in this Consent Order, the following definitions shall apply:

a. "CERCLA" shall mean the Comprehensive Environmental Response,

Compensation, and Liability Act of 1980, 42 U.S.C. § 9601, *et seq.*

b. "Consent Order" or "Order" shall mean this Administrative Order on Consent and all appendices attached hereto. In the event of conflict between this Order and any appendix, the Order shall control.

c. "Day" shall mean a calendar day. In computing any period of time under this Consent Order, where the last day would fall on a Saturday, Sunday, or federal holiday, the period shall run until the close of business of the next working day.

d. "EPA" shall mean the United States Environmental Protection Agency and any successor departments, agencies or instrumentalities.

e. "EPA Hazardous Substance Superfund" shall mean the Hazardous Substance Superfund established by the Internal Revenue Code, 26 U.S.C. § 9507.

f. **[Use this definition only if the consideration includes a cash payment.]**  
"Interest" shall mean interest at the rate specified for interest on investments of the EPA Hazardous Substance Superfund established by 26 U.S.C. § 9507, compounded annually on October 1 of each year, in accordance with 42 U.S.C. § 9607(a). The applicable rate of interest shall be the rate in effect at the time the interest accrues. The rate of interest is subject to change on October 1 of each year.<sup>1</sup>

g. "Paragraph" shall mean a portion of this Consent Order identified by an Arabic numeral.

h. "Parties" shall mean EPA and the Respondent.

i. "Property" shall mean that portion of "Site" that is owned by Respondent. **[If Property and Site are the same, then define Site only, but include in the definition a description of the property.]**

j. "Respondent" shall mean [insert name].

k. "Response Costs" shall mean all costs of "response" as that term is defined by Section 101(25) of CERCLA, 42 U.S.C. § 9601(25).

l. "Section" shall mean a portion of this Consent Order identified by a Roman numeral.

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<sup>1</sup> The Superfund currently is invested in 52 week MK notes. The interest rate for these MK notes changes on October 1 of each year. Current and historical rates are available online at [http://www.epa.gov/budget/finstatement/superfund/int\\_rate.htm](http://www.epa.gov/budget/finstatement/superfund/int_rate.htm).

m. "Site" shall mean the \_\_\_\_\_ Superfund Site, encompassing approximately \_\_\_\_ acres, located at [insert address or description of location] in [insert City, County, State] and [insert either "generally shown on the map attached as Appendix A" or "generally designated by the following property description: \_\_\_\_\_."]

n. "United States" shall mean the United States of America, including its departments, agencies and instrumentalities.

## **V. STATEMENT OF FACTS**

7. [In one or more paragraphs, insert site name, location, description, NPL status and brief statement of historical hazardous substance activity at the Site.]

8. Hazardous substances have been or are threatened to be released at or from the Site. **[NOTE: Additional information about specific hazardous substances present on- or off-site may be included, and may have additional relevance to any settlement offer to a party "threatened" with contribution action as described in the Contaminated Aquifer Policy.<sup>2</sup>]**

9. As a result of the release or threatened release of hazardous substances, EPA has undertaken response actions at or in connection with the Site under Section 104 of CERCLA, 42 U.S.C. § 9604 [, and will undertake response actions in the future]. **[OPTIONAL: Insert brief description of response actions undertaken at the Site to date by EPA or other persons, noting whether a removal, RI/FS or ROD(s) have been completed. Describe briefly any prior settlements for performance of work at the Site.]**

10. In performing these response actions, EPA has incurred [and will continue to incur] response costs at or in connection with the Site. **[NOTE: The dollar amount of costs incurred as of a specific date should be included. Describe briefly any previous cost recovery settlements under which any of these costs have been reimbursed to EPA by Site PRPs.]**

11. [Identify Respondent and the nature of Respondent's ownership interest in the Site, and the manner in which Respondent acquired the Site, *e.g.*, by purchase, bequest, eminent domain proceedings, *etc.*, and the date of acquisition.]

12. [In one or more paragraphs, present in summary fashion the factual basis for EPA's determination in Section VI below that Respondent's involvement with the Site is such that Respondent is eligible for settlement under the requirements of Section 122(g)(1)(B).]

An example follows:

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<sup>2</sup> The "Policy Toward Owners of Property Containing Contaminated Aquifers," issued on May 24, 1995, published at 60 Fed. Reg. 34790 (July 3, 1995), suggests that Section 122(g) *de minimis* landowner settlements with parties threatened with contribution suits may be appropriate, where the policy applies.

"Respondent represents, and for the purpose of this Order EPA accepts, that Respondent made all appropriate inquiry into the previous uses of the [Property] [Site] (address the elements of Section 122(g)(1)(B) concerning disposal and/or contributing to a release), but did not discover that hazardous substances had been disposed of on it by a previous owner who did not disclose that information to Respondent at the time of Respondent's acquisition of the [Property] [Site]."

13. EPA estimates that the total response costs incurred and to be incurred at or in connection with the Site by the EPA Hazardous Substance Superfund and by other persons is [insert either "\$\_\_\_\_" or "between \$\_\_\_\_ and \$\_\_\_\_"]. The payment required to be made by Respondent pursuant to this Consent Order is a minor portion of this total amount. **[NOTE: This statement need not be included if EPA is settling only for access and due care assurances. The dollar figure inserted should include the total response costs incurred to date as well as the Agency's projection of the total response costs to be incurred during completion of the remedial action at the Site. The response cost total should include United States' costs and costs incurred by other persons.]**

## **VI. DETERMINATIONS**

14. Based upon the Statement of Facts set forth above and on the administrative record for this Site, EPA has determined that:

- a. The [insert site name] site is a "facility" as that term is defined in Section 101(9) of CERCLA, 42 U.S.C. § 9601(9).
- b. Respondent is a "person" as that term is defined in Section 101(21) of CERCLA, 42 U.S.C. § 9601(21).
- c. Respondent is an "owner," as defined in Section 101(20), 42 U.S.C. § 9601(20), and within the meaning of Section 107(a)(1) of CERCLA, 42 U.S.C. § 9607(a)(1), of a "facility," as defined in Section 101(9) of CERCLA, 42 U.S.C. § 9601(9), and is a "potentially responsible party" within the meaning of Section 122(g)(1) of CERCLA, 42 U.S.C. § 9622(g)(1);
- d. There has been an actual or threatened "release" of a "hazardous substance" from the Site as those terms are defined in Section 101(22) and (14) of CERCLA, 42 U.S.C. §§ 9601(22) and (14).
- e. The actual or threatened "release" caused the incurrence of response costs.
- f. Prompt settlement with Respondent is practicable and in the public interest within the meaning of Section 122(g)(1) of CERCLA, 42 U.S.C. § 9622(g)(1).
- g. This Consent Order involves at most only a minor portion of the response

costs at the Site within the meaning of Section 122(g)(1) of CERCLA, 42 U.S.C. § 9622(g)(1).

**[NOTE: This Paragraph (g) need not be included if EPA is settling only for access and due care assurances.]**

h. Respondent is eligible for a *de minimis* settlement pursuant to Section 122(g)(1)(B) of CERCLA, 42 U.S.C. § 9622(g)(1)(B).

**[NOTE: If Attorney General approval is not required for this settlement because total past and projected response costs of the United States at the Site are not expected to exceed \$500,000, insert the following Paragraph 14(i) and delete Section XIX, Attorney General Approval.]**

[i. The total past and projected response costs of the United States at or in connection with the Site will not exceed \$500,000, excluding interest.]

## **VII. ORDER**

15. Based upon the administrative record for the Site and the Statement of Facts and Determinations set forth above, and in consideration of the promises and covenants set forth herein, the following is hereby AGREED TO AND ORDERED:

## **VIII. PAYMENT**

**[NOTE: Where settlement with a *de minimis* landowner does not require a cash payment, delete Section VIII and re-number the rest of the Order.]**

16. Within 30 days after the effective date of this Consent Order, Respondent shall pay to the EPA Hazardous Substance Superfund \$ \_\_\_\_\_. **[NOTE: The following language should be used if the payment amount is above \$25,000. Regional attorneys should consult with the Comptroller's Office in the Region to determine if more specific EFT instructions should be included.]** Payment shall be made to EPA by Electronic Funds Transfer ("EFT") in accordance with current EFT procedures to be provided to Respondent by EPA Region \_\_\_, and shall be accompanied by a statement identifying the name and address of the party making payment, the Site name, the EPA Region and Site/Spill ID Number \_\_\_, and the EPA docket number for this action. **[NOTE: The following language may be used if the payment amount is below \$25,000.]** Payment shall be made by certified or cashier's check made payable to "EPA Hazardous Substance Superfund." The check, or a letter accompanying the check, shall identify the name and address of the party making payment, the Site name, the EPA Region and Site/Spill ID Number \_\_\_, and the EPA docket number for this action, and shall be sent to:

EPA Superfund

[Insert Regional Superfund lockbox number and address]

17. At the time of payment, Respondent shall send notice that such payment has been made to:

[Insert name and address of Regional Attorney and/or Remedial Project Manager, and a contact in the Regional Comptroller's Office.]

**[NOTE ON USE OF SPECIAL ACCOUNT PAYMENTS: The payment made under Paragraph 16 may be deposited in the EPA Hazardous Substance Superfund, or may be deposited in a site-specific special account within the EPA Hazardous Substance Superfund (more accurately referred to as a "reimbursable account"). A site-specific special account should only be considered if the amount of money being recovered in a settlement justifies the incurrence of the expense of setting up such an account, or if a site-specific special account for the Site already exists. If the negotiating team believes that a site-specific special account is appropriate, the Order should include clear instructions indicating which portion of the payment is to be placed in the EPA Hazardous Substance Superfund and which portion of the payment is to be retained in a special account. Sample instructions for the three possible payment options (EPA hazardous Substance Superfund, Special Account, or split between the EPA Hazardous Substance Superfund and the Special Account) follow:]**

**[Insert one of the following three paragraphs here.]**

**[If the entire payment will be deposited in the EPA Hazardous Substance Superfund:]**

The total amount to be paid by Respondent pursuant to Paragraph 16 shall be deposited in the EPA Hazardous Substance Superfund.

**[If the entire payment will be deposited in a special account:]**

The total amount to be paid by Respondent pursuant to Paragraph 16 shall be deposited by EPA in the [Site Name] Special Account within the EPA Hazardous Substance Superfund to be retained and used to conduct or finance response actions at or in connection with the Site, or to be transferred by EPA to the EPA Hazardous Substance Superfund.

**[If the payment will be split between the EPA Hazardous Substance Superfund and a special account:]**

Of the total amount to be paid by Respondent pursuant to Paragraph 16, ['\$\_\_\_\_\_' or '\_\_\_\_%'] shall be deposited by EPA in the EPA Hazardous Substance Superfund and ['\$\_\_\_\_\_' or '\_\_\_\_%'] shall be deposited by EPA in the [Site Name] Special Account within the EPA Hazardous Substance Superfund to be retained and used to conduct or finance response actions at or in connection with the Site, or to be transferred by EPA to the EPA Hazardous Substance Superfund.

**[OPTIONAL: \_\_. WORK TO BE PERFORMED]**

## **IX. ACCESS AND INSTITUTIONAL CONTROLS**

18. **[NOTE: This Section should be used if Respondent is the Site owner or otherwise controls access to the Site or to other property to which access is needed. Where no institutional controls, land use restrictions, or environmental easements are necessary, or will be necessary, the Section can be substantially reduced. Subparagraph (a) of the first paragraph should be used to secure access. Subparagraph (b) of the first paragraph should be included if EPA determines that land/water use restrictions are needed on property owned by Respondent to ensure the integrity or protectiveness of the remedial action. Subparagraph (c) of the first paragraph should be included if EPA determines that a property interest running with the land (granting either a right of access or a right to enforce land/water use restrictions) should be acquired by EPA or another grantee from Respondent.]**

[\_\_\_. If the Site, or any other property where access and/or land/water use restrictions are needed to implement response activities at the Site, is owned or controlled by Respondent, Respondent shall:

a. commencing on the effective date of this Consent Order, provide the United States, [the State [Commonwealth]] and its [their] representatives, including EPA and its contractors, with access at all reasonable times to the Site, or such other property, for the purpose of conducting any response activity related to the Site, including, but not limited to the following activities:

1. Monitoring, investigation, removal, remedial or other activities at the Site;
2. Verifying any data or information submitted to the United States [or the State [Commonwealth]];
3. Conducting investigations relating to contamination at or near the Site;
4. Obtaining samples;
5. Assessing the need for, planning, or implementing additional response actions at or near the Site;
6. Assessing Respondent's compliance with this Consent Order; and
7. Determining whether the Site or other property is being used in a manner that is prohibited or restricted, or that may need to be prohibited or restricted, by or pursuant to this Consent Order.

b. commencing on the effective date of this Consent Order, refrain from using the Site, or such other property, in any manner that would interfere with or adversely affect the implementation, integrity or protectiveness of the [removal or] remedial measures to be

performed at the Site. Such restrictions include, but are not limited to, **[LIST SPECIFIC RESTRICTIONS]**; and

c. execute and record in the Recorder's Office [or Registry of deeds or other appropriate land records office] of \_\_\_\_\_ County, State [Commonwealth] of \_\_\_\_\_, an easement, running with the land, that (i) grants a right of access for the purpose of conducting response activities at the Site, and (ii) grants the right to enforce the land/water use restrictions listed in Paragraph (b) above [cross-reference immediately preceding paragraph] of this Consent Order, or other restrictions that EPA determines are necessary to implement, ensure non-interference with, or ensure the protectiveness of the [removal or] remedial measures to be performed at the Site. Respondent shall grant the access rights and the rights to enforce the land/water use restrictions to [(i) the United States, on behalf of EPA, and its representatives, (ii) the State [Commonwealth] and its representatives, (iii) and/or other appropriate grantees<sup>3</sup>]. Respondent shall, within 45 days of the date this Consent Order becomes final,<sup>4</sup> submit to EPA for review and approval with respect to such property:

1. A draft Easement, in substantially the form attached hereto as Appendix \_\_\_\_\_ that is enforceable under the laws of the State [Commonwealth] of \_\_\_\_\_; and

2. A current title insurance commitment or some other evidence of title acceptable to EPA, which shows title to the land described in the easement to be free and clear of all prior liens and encumbrances (except when those liens or encumbrances are approved by EPA or when, despite best efforts, Respondent is unable to obtain release or subordination of such prior liens or encumbrances).

Within 15 days of EPA's approval and acceptance of the easement, Respondent shall update the title search and, if it is determined that nothing has occurred since the effective date of the commitment or report to affect the title adversely, record the easement with the Recorder's Office [or Registry of Deeds or other appropriate office] of \_\_\_\_\_ County. Within 30 days of recording the easement, Respondent shall provide EPA with final title evidence acceptable under the Standards, and a certified copy of the original recorded easement showing the clerk's recording stamps.

19. If EPA determines that land/water use restrictions in the form of state or local laws, regulations, ordinances or other governmental controls are needed to implement response

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<sup>3</sup> If, at the time that a Consent Order is being negotiated, EPA is not able to determine which persons should be the grantees of the easement, this Subparagraph (c) should be redrafted to insert the phrase "one of more of the following persons, as determined by EPA," prior to the bracketed list of potential grantees.

<sup>4</sup> If, at the time that a Consent Order is being negotiated, EPA is unable to determine whether it wants to obtain an easement that runs with the land, but believes that it might want to obtain such an interest in the future, this Subparagraph (c) should be redrafted to insert the phrase "if EPA so requests," at the beginning of the subparagraph, and Respondent should be required to submit the draft easement a certain number of days from the date of EPA's request.

activities at the Site, ensure the integrity and protectiveness thereof, or ensure non-interference therewith, Respondent shall cooperate with EPA's [and the State's [Commonwealth's]] efforts to secure such governmental controls. Respondent shall record the notice of any such governmental controls within 10 days of EPA's approval of the notice. Respondent shall provide EPA with a certified copy of the recorded notice within 10 days of recording such notice.

20. Notwithstanding any provision of this Consent Order, the United States [and the State [Commonwealth]] retain[s] all of its access authorities related thereto under CERCLA, RCRA and any other applicable statute or regulations.

**[OPTIONAL: \_\_. NOTICE TO SUCCESSORS-IN-TITLE]**

**[NOTE: This Section may be needed depending on the specific circumstances of the property owned by the Respondent. If there will be significant response activity on such property, or there are institutional controls that may otherwise not be known to subsequent owners, then recordation in local land records may be appropriate. Use only the provisions that apply.]**

\_\_. With respect to any property owned or controlled by Respondent that is located within the Site, within 15 days of the effective date of this Order, Respondent shall submit to EPA for review and approval a notice to be filed with the Recorder's Office [or Registry of Deeds or other appropriate office], \_\_\_\_\_ County, [State/Commonwealth] of \_\_\_\_\_, which shall provide notice to all successors-in-title that the Property is part of the Site, that EPA selected a remedy for the Site on \_\_\_\_\_, and that potentially responsible parties have entered into a Consent Decree requiring implementation of the remedy. Such notice(s) shall identify the United States District Court in which the Consent Decree was filed, the name and civil action number of this case, and the date the Consent Decree was entered by the Court. Respondent shall record the notice(s) within 10 days of EPA's approval of the notice(s). Respondent shall provide EPA with a certified copy of the recorded notice(s) within 10 days of recording such notice(s).

\_\_. At least 30 days prior to the conveyance of any interest in property located within the Site including, but not limited to, fee interests, leasehold interests, and mortgage interests, Respondent shall give the grantee written notice of (i) this Order, (ii) any instrument by which an interest in real property has been conveyed that confers a right of access to the Site (hereinafter referred to as "access easements") pursuant to Section \_\_ (Access and Institutional Controls), and (iii) any instrument by which an interest in real property has been conveyed that confers a right to enforce restrictions on the use of such property (hereinafter referred to as "restrictive easements") pursuant to Section \_\_ (Access and Institutional Controls). At least 30 days prior to such conveyance, Respondent shall also give written notice to EPA and the State of the proposed conveyance, including the name and address of the grantee, and the date on which notice of the Order, access easements, and/or restrictive easements was given to the grantee.

\_\_. In the event of any such conveyance, Respondent's obligations under this Order, including, but not limited to, its obligation to provide or secure access and institutional controls,

as well as to abide by such institutional controls, pursuant to Section \_\_ (Access and Institutional Controls) of this Order, shall continue to be met by Respondent. In no event shall the conveyance release or otherwise affect the liability of Respondent to comply with all provisions of this Order, absent the prior written consent of EPA.

#### **X. DUE CARE AND COOPERATION**

21. Nothing in this Consent Order shall be construed to relieve Respondent of Respondent's duty to exercise due care with respect to the hazardous substances at the Site or Respondent's duty to comply with all applicable local, State, and federal laws and regulations.

22. Respondent agrees to cooperate fully with EPA in the implementation of response actions at the Site and further agrees not to interfere with such response actions. EPA agrees, consistent with its responsibilities under applicable law, to use reasonable efforts to minimize any interference with Respondent's operations by such entry and response. In the event Respondent becomes aware of any action or occurrence that causes or threatens a release of hazardous substances, pollutants or contaminants at or from the Site that constitutes an emergency situation or may present an immediate threat to public health or welfare or the environment, Respondent shall immediately take all appropriate action to prevent, abate, or minimize such release or threat of release, and shall, in addition to complying with any applicable notification requirements under Section 103 of CERCLA, 42 U.S.C. § 9603, or any other law, immediately notify EPA of such release or threatened release.

#### **XI. FAILURE TO [MAKE PAYMENT][COMPLY WITH REQUIREMENTS OF ORDER]**

23. **[If consideration includes a cash payment insert following bracketed language.]**  
[If Respondent fails to make full payment within the time required by Section VIII, Respondent shall pay Interest on the unpaid balance. In addition,][if/If] Respondent fails [to make full payment as required by Section VIII or] to comply with the requirements of Section IX and X [or \_\_\_\_ (insert reference to work requirements and notice to successors-in-title, if any)] of this Order, the United States may, in addition to any other available remedies or sanctions, bring an action against Respondent seeking injunctive relief to compel compliance with this Order and/or seeking civil penalties under Section 122(l) of CERCLA, 42 U.S.C. § 9622(l), for the failure to comply.

#### **XII. CERTIFICATION OF RESPONDENT**

24. By signing this Consent Order, Respondent certifies, individually, that, to the best of its knowledge and belief, it:

a. has conducted a thorough, comprehensive, good faith search for documents, and has fully and accurately disclosed to EPA, all information currently in its possession, or in the possession of its officers, directors, employees, contractors or agents, that relates in any way to

the ownership, operation, or control of the Site, or to the ownership, possession, generation, treatment, transportation, storage or disposal of a hazardous substance, pollutant, or contaminant at or in connection with the Site;

b. has not altered, mutilated, discarded, destroyed or otherwise disposed of any records, documents, or other information relating to its potential liability regarding the Site after notification of potential liability or the filing of a suit against it regarding the Site; and

c. has and will comply fully with any and all EPA requests for information regarding the Site pursuant to Sections 104(e), 122(e)(3)(B), and 122(g)(8) of CERCLA, 42 U.S.C. §§ 9604(e), 9622(e)(3)(B), and 9622(g)(8) [insert, if applicable “, and Section 3007 of the Resource Conservation and Recovery Act, 42 U.S.C. § 6927”].

### **XIII. COVENANT NOT TO SUE BY UNITED STATES**

25. In consideration of the valuable consideration that will be provided by Respondent under the terms of this Consent Order, and except as specifically provided in Section XIV (Reservations of Rights by United States), the United States<sup>5</sup> covenants not to sue or take administrative action against Respondent pursuant to Sections 106 or 107 of CERCLA, 42 U.S.C. §§ 9606 or 9607, [and Section 7003 of the Resource Conservation and Recovery Act, 42 U.S.C. § 6973,]<sup>6</sup> relating to the Site. With respect to present and future liability, this covenant not to sue shall take effect upon receipt of Respondent's payment as required by Section VIII. **[NOTE: If work is to be performed instead of a cash payment, this sentence should read: “upon satisfactory completion of the work specified in the Scope of Work.” If EPA is settling only for access and due care assurances, this sentence should read: “upon the effective date of this Consent Order.”]** This covenant not to sue is conditioned upon the satisfactory performance by Respondent of all obligations under this Consent Order and the veracity of the information provided to EPA by Respondent relating to Respondent's involvement with the Site. This covenant not to sue extends only to Respondent and does not extend to any other person.

### **XIV. RESERVATIONS OF RIGHTS BY UNITED STATES**

26. The United States reserves, and this Consent Order is without prejudice to, all rights against Respondent with respect to all matters not expressly included within the Covenant Not to Sue by the United States in Section XIII. Notwithstanding any other provision of the Consent Order, the United States reserves all rights against Respondent with respect to:

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<sup>5</sup> If any agency other than EPA or DOJ, such as Coast Guard or Federal Emergency Management Agency, has or may incur response costs at the Site, such costs must either be addressed in the settlement or must be excluded from the scope of the covenant not to sue and reserved in the reservation of rights.

<sup>6</sup> Note that when a RCRA Section 7003 covenant is included, Section 7003(d) of RCRA requires EPA to provide an opportunity for a public meeting in the affected area.

a. claims based on a failure by Respondent to meet a requirement of this Consent Order;

b. liability as a result of failure to exercise due care with respect to hazardous substances at the Site;

c. liability resulting from exacerbation by Respondent of the release or threat of release of hazardous substances from the Site;

d. criminal liability;

e. liability for damages for injury to, destruction of, or loss of natural resources, and for the costs of any natural resource damage assessments;<sup>7</sup> or

f. liability arising from any future arrangement for disposal or treatment of a hazardous substance, pollutant or contaminant at the Site after the effective date of this Consent Order.

27. Nothing in this Consent Order constitutes a covenant not to sue or to take action or otherwise limits the ability of the United States, including EPA, to seek or obtain further relief from Respondent, and the covenant not to sue in Section XIII of this Consent Order is null and void if information not currently known to EPA is discovered that indicates that Respondent fails to meet any of the criteria specified in Section 122(g)(1)(B) of CERCLA.

#### **XV. COVENANT NOT TO SUE BY RESPONDENT**

28. Respondent covenants not to sue and agrees not to assert any claims or causes of action against the United States or its contractors or employees with respect to the Site<sup>8</sup> or this Consent Order including, but not limited to:

a. any direct or indirect claim for reimbursement from the EPA Hazardous Substance Superfund based on Sections 106(b)(2), 107, 111, 112, or 113 of CERCLA, 42 U.S.C. §§ 9606(b)(2), 9607, 9611, 9612, or 9613, or any other provision of law;

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<sup>7</sup> This natural resource damage reservation must be included unless the Federal Natural Resource Trustee[s] has/have agreed to a covenant not to sue pursuant to Section 122(j)(2) of CERCLA. In accordance with Section 122(j)(1) of CERCLA, where the release or threatened release of any hazardous substances at the Site may have resulted in damages to natural resources under the trusteeship of the United States, the Region should notify the Federal Natural Resource Trustee[s] of the negotiations and encourage the Trustee[s] to participate in the negotiations.

<sup>8</sup> If the Consent Order does not resolve Respondent's liability for the Site as a whole, the scope of Paragraph 28 may be narrowed to conform to the scope of EPA's covenant not to sue.

b. any claim arising out of response actions at or in connection with the Site including any claim under the United States Constitution, the Constitution of the State [Commonwealth] of \_\_\_\_\_, the Tucker Act, 28 U.S.C. § 1491, the Equal Access to Justice Act, 28 U.S.C. § 2412, or at common law; and

c. any claim against the United States pursuant to Sections 107 and 113 of CERCLA, 42 U.S.C. §§ 9607 and 9613, relating to the Site.<sup>9</sup>

Except as provided in Paragraph 30 (Waiver of Claims) and Paragraph 32 (Waiver of Claim-Splitting Defenses), these covenants not to sue shall not apply in the event the United States brings a cause of action or issues an order pursuant to the reservations set forth in Paragraph 26 (b), (c), (e), or (f) or Paragraph 27, but only to the extent that Respondent's claims arise from the same response action or response costs that the United States is seeking pursuant to the applicable reservation.

29. Nothing in this Consent Order shall be deemed to constitute preauthorization or approval of a claim within the meaning of Section 111 of CERCLA, 42 U.S.C. § 9611, or 40 C.F.R. § 300.700(d).

30. Respondent agrees not to assert any claims or causes of action (including claims for contribution under CERCLA) that it may have for all matters relating to the Site, against any other person who is a potentially responsible party under CERCLA at the Site. This waiver shall not apply with respect to any defense, claim, or cause of action that Respondent may have against any other person if such person asserts a claim or cause of action relating to the Site against such Respondent; nor shall it apply to any defense, claim, or cause of action undertaken by Respondent in response to a release or threat of release in accordance with Paragraph 22 of this Order.<sup>10</sup>

## **XVI. EFFECT OF SETTLEMENT/CONTRIBUTION PROTECTION**

31. Except as provided in Paragraph 30 (Waiver of Claims), nothing in this Consent Order shall be construed to create any rights in, or grant any cause of action to, any person not a Party to this Consent Order. Except as provided in Paragraph 30 (Waiver of Claims) the United States and Respondent each reserves any and all rights (including, but not limited to, any right to contribution), defenses, claims, demands, and causes of action that each Party may have with

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<sup>9</sup> The settlement should, consistent with Paragraph 30, release any claims by Respondent against the United States related to the Site. Where a claim is asserted by a potentially responsible party, or the Region has any information suggesting federal agency liability, all information relating to potential federal liability should be provided to the affected agency and DOJ as soon as possible in order to resolve any such issues, either in this settlement or a future settlement. Settlement of any federal liability will require additional revisions to this document.

<sup>10</sup> This paragraph is not intended to preclude parties from pursuing insurance claims that they may have. The language may be modified in appropriate cases to allow parties to preserve such claims.

respect to any matter, transaction, or occurrence relating in any way to the Site against any person not a Party hereto.

32. In any subsequent administrative or judicial proceeding initiated by the United States for injunctive relief, recovery of response costs, or other relief relating to the Site, Respondent shall not assert, and may not maintain, any defense or claim based upon the principles of waiver, *res judicata*, collateral estoppel, issue preclusion, claim-splitting, or other defenses based upon any contention that the claims raised in the subsequent proceeding were or should have been brought in the instant action; provided, however, that nothing in this Paragraph affects the enforceability of the covenant not to sue in Section XIII.

33. The Parties agree that Respondent is entitled, as of the effective date of this Consent Order, to protection from contribution actions or claims as provided by Sections 113(f)(2) and 122(g)(5) of CERCLA, 42 U.S.C. §§ 9613(f)(2) and 9622(g)(5), for "matters addressed" in this Consent Order. The "matters addressed" in this Consent Order are [all response actions taken or to be taken and all response costs incurred or to be incurred, at or in connection with the Site, by the United States or by any other person.]<sup>11</sup>

## **XVII. INTEGRATION/APPENDICES**

34. This Consent Order and its appendices constitute the final, complete and exclusive agreement and understanding between the Parties with respect to the settlement embodied in this Consent Order. The Parties acknowledge that there are no representations, agreements or understandings relating to the settlement other than those expressly contained in this Consent Order. The following appendix is attached to and incorporated into this Consent Order:

"Appendix A" is [ the map of the Site].

**[NOTE: List any additional appendices.]**

### **[OPTIONAL: \_\_. RELEASE OF LIEN]**

**[NOTE: This provision should not be used unless a Section 107(l) or 107(r) lien has been perfected. Since a qualifying *de minimis* landowner has to show that he purchased without knowledge of contamination, the purchase price of the property was most likely the fair market value without a reduction for contamination, and therefore the landowner would have realized no windfall due to EPA's response work at the Site.]**

\_\_. Subject to the Reservation of Rights in Section XIV of this Consent Order, upon

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<sup>11</sup> This definition of "matters addressed" assumes that this Consent Order is designed to resolve fully Respondent's liability at the Site. If the intended resolution of liability is narrower in scope, then the definition of "matters addressed" will need to be narrowed.

[payment of the amount specified in Section VIII] [satisfactory completion of work specified in Section \_\_\_\_\_], EPA agrees to release any lien it may have on the [Site] [Property] under Section 107 of CERCLA, 42 U.S.C. § 9607, with respect to Respondent. [If settling for access and due care only, then the release of the lien shall take place following the “effective date” of this Consent Order.]

### **XVIII. PUBLIC COMMENT**

35. This Consent Order shall be subject to a public comment period of not less than 30 days pursuant to Section 122(i) of CERCLA, 42 U.S.C. § 9622(i). In accordance with Section 122(i)(3) of CERCLA, 42 U.S.C. § 9622(i)(3), EPA may withdraw or withhold its consent to this Consent Order if comments received disclose facts or considerations that indicate that this Consent Order is inappropriate, improper, or inadequate.

### **XIX. ATTORNEY GENERAL APPROVAL**

**[NOTE: This Section should be used if Attorney General approval is required for this settlement because total past and projected response costs at the Site will exceed \$500,000, excluding interest. The Region should consult with DOJ during the negotiations process and should obtain written DOJ approval of the settlement before publishing notice of the proposed Consent Order in the Federal Register pursuant to Section 122(i) of CERCLA. The Region should discuss with DOJ any significant comments received during the public comment period. If the Region believes that the Consent Order should be modified based upon public comment, the Region should discuss with the DOJ attorney assigned to the case whether the proposed change will require formal re-approval by DOJ.]**

36. The Attorney General or [his/her] designee has approved the settlement embodied in this Consent Order in accordance with Section 122(g)(4) of CERCLA, 42 U.S.C. § 9622(g)(4).

### **XX. EFFECTIVE DATE**

37. The effective date of this Consent Order shall be the date upon which EPA issues written notice to Respondent that the public comment period pursuant to Section XVIII has closed and that comments received, if any, do not require modification of or EPA withdrawal from this Consent Order.

### **XXI. DISCLAIMER**

38. This Consent Order in no way constitutes a finding by EPA as to the risks to human health and the environment that may be posed by contamination at the Site nor constitutes any representation by EPA that the Site is fit for any particular purpose.

IT IS SO AGREED AND ORDERED:

U.S. Environmental Protection Agency

By: \_\_\_\_\_  
[Name] [Date]

Regional Administrator, Region \_\_\_\_

**[NOTE: If the Regional Administrator has redelegated authority to enter into *de minimis* settlements, insert name and title of delegated official.]**

THE UNDERSIGNED RESPONDENT enters into this Consent Order in the matter of [insert U.S. EPA docket number], relating to the [insert Site name and location]:

FOR RESPONDENT: \_\_\_\_\_  
[Name]  
\_\_\_\_\_  
[Address]

By: \_\_\_\_\_  
[Name] [Date]